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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 417. 133

THOMAS C. PORTER, W. H. CADES AND S. HARRIS AUSTIN, LATE COPARTNERS DOING BUSINESS UNDER THE FIRM-NAME OF CUSHING, PORTER & CADES, PLAINTIFFS IN ERROR,

vs.

ALANSON W. BEARD, COLLECTOR OF CUSTOMS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 18, 1884.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, MAY 3, 1887.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Thomas C. Porter, of Framingham; W. H. Cades, of Boston, and S. Harris Austin, of Needham, all in Massachusetts, late copartners doing business under the firm name of Cushing, Porter & Cades, plaintiffs, and Alanson W. Beard, collector of the customs for the revenue district of Boston and Charlestown, defendant, in an action of contract, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twentieth day of September, in the year of our Lord one thousand eight hundred and eighty-four.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
LE BARON B. COLT,
Circuit Judge.

2 Circuit Court of the United States, District of Massachusetts, *ss.*

And now, here, the judges of the circuit court of the United States in and for the District of Massachusetts make return of this writ by annexing thereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this first day of October, A. D. 1884.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. STETSON, *Clerk.*

3 The United States of America to Alanson W. Beard, late collector of the customs of the revenue district of Boston and Charlestown, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Massachusetts, wherein Thomas C. Porter, W. H. Cades, and S. Harris Austin, late copartners under the name of Cushing, Porter & Cades, plaintiffs, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Le Baron B. Colt, circuit judge of the United States, first judicial circuit, this twentieth day of September, in the year of our Lord one thousand eight hundred and eighty-four.

LE BARON B. COLT,
U. S. Circuit Judge.

Due service of this citation is acknowledged.

GEORGE P. SANGER,
U. S. Att'y.

3*a* UNITED STATES OF AMERICA, } *ss:*
Massachusetts District, }

At a circuit court of the United States for the first circuit begun and holden at Boston, within and for the district of Massachusetts, on Monday the sixteenth day of October, in the year of our Lord one thousand eight hundred and eighty-two, the fifteenth day of said October happening on a Sunday.

Before the Honorable John Lowell, circuit judge.

THOMAS C. PORTER, of Framingham; W. H. CADES, of Boston, and S. Harris Austin, of Needham, all in Massachusetts, late Co-
4 partners Doing Business under the Firm Name of Cushing, Porter & Cades, Plaintiffs,

v.

ALANSON W. BEARD, Collector of the Customs for the Revenue District of Boston and Charlestown, Defendant.

In an action of contract.

1st count. And the plaintiffs say the defendant owes them four hundred seventy-five & $\frac{35}{100}$ dollars according to the account hereto annexed.

Account Annexed.

BOSTON, *Aug.* 13*th*, 1881.

A. W. Beard, collector, to Mess. Porter, Cades & Austin, Dr.

1881.

(1) May 25.	To excess of duty paid on 2 cases Nich. blue A. and 2 cases Nich. blue V. B., entered per str. Istrian Jan. 15, 1878	106 90
5 (2) May 25.	Excess of duty paid on 2 cases fuchsine J. O. O. & 2 cases fuchsine B., 2 cases Nich. blue B. B., entered per str. Bohemian Dec. 23, 1878	118 45
(3) May 20.	Excess of duty paid on 2 cases fuchsine B. & 2 cases Paris violet 170, 1 case Hoffman violet ½ B., 1 case Hoffman R., entered per str. Samaria Dec. 4, 1878	116 20
(4) " "	Excess of duty paid on 1 case Nich. blue G. A., 1 case Nich. blue 4 B., 1 case Nich. blue B., 1 case blue R. R. S. 2, & 2 cases vert B. 1, entered per str. Samaria Oct. 28, 1878	135 80
		$477 35

Second count. And also for that on the day of the purchase of this writ the said defendant, being indebted to the plaintiffs in the sum of four hundred seventy-seven $\frac{35}{100}$ dollars, demanded, exacted, and received of the plaintiff- by the defendants, then and now collector of the customs for the revenue district of Boston and Charlestown, under color of a law of the United States for
6 the collection of duties on imports, and by the plaintiffs paid under protest, and before that time had and received by the defendant to the plaintiffs' use, in consideration thereof promised to pay the plaintiffs when he should be thereto afterwards requested; yet said defendant has not paid the same or any part thereof, though thereto often requested—

To the damage of the said plaintiffs, as they say, the sum of four thousand dollars.

The writ in this cause is dated the thirteenth day of August, A. D. 1881, and was duly entered at the October term of this court, A. D. 1881, when and where the parties appeared, by their respective attorneys.

On the thirty-first day of October the following answer was filed:

Answer.

7 And now comes the defendant, and for answer to plaintiffs' writ and declaration denies each and every allegation thereof.

This cause was thence continued to the present October term, A. D. 1882, when, on the twenty-third day of November, A. D. 1882, the following motion to dismiss is filed.

Motion to Dismiss.

And now comes the defendant in the above-entitled cause, and moves that the said cause be dismissed and a judgment of non-pros entered, because no bill of particulars, such as is required by section 3012 of the Revised Statutes of the United States, was served on the defendant or his attorney within thirty days after due notice to the plaintiff of the appearance of the defendant or at any time.

Afterwards, on the same day, the following motion to
8 amend declaration is filed and allowed:

Motion to Amend Declaration.

And now come the plaintiffs, and move to amend their declaration in the above-entitled cause by adding thereto the following items:

To excess of duty paid on one case of Nicholson blue A...	$25 90
Ex steamship Istrian, Jan 15th '78.	
To excess of duty paid on—	
One case Nich. blue B.	
1 case Nich. blue 2 B.	
2 " vert 2 J. E.	145 90
1 " French red.	
Ex steamship Samaria, Oct. 28, '78.	
To excess of duty paid on one case violet Hoffman 2 B...	16 40
Ex steamship Samaria, Dec. 4, '78.	
To excess of duty paid on—	
1 case blue D.	
1 " " ceil.	28 52
Ex steamship Bohemian, Dec. 23d, '78.	
	$216 70

9 And the plaintiffs further move to amend their declaration by striking out the words "four hundred and seventy-seven dollars and thirty-five cents" where they appear and inserting in place thereof the words six hundred and ninety-four dollars and five cents.

The ground and purpose of this motion is to consolidate entire invoices in one suit, a motion being now made to strike out from the declarations in No-. 1735 and 1736 between the same parties the items hereby moved to be added.

On the said twenty-third day of November the following motion is filed and allowed:

Motion to Transfer Items in Bill of Particulars in No. 1735 *to Bill of Particulars in this Cause.*

And now come plaintiffs, and move leave to transfer from
10 the bill of particulars served in No. 1735 between same parties the items which the court has this day directed to be transferred from the declaration in No. 1735 to the declaration in No. 1738 and

to place the said items in the bill of particulars for the case numbered 1738.

On the same day the following motion is filed and allowed:

Motion to Transfer Items in Bill of Particulars in No. 1736 to Bill of Particulars in this Case.

And now come plaintiffs, and move leave to transfer from the bill of particulars served in No. 1736 between same parties the items which the court has this day directed to be transferred from the declaration in 1736 to the declaration in 1738 and to place the said items in the bill of particulars for the case numbered 1738.

11 On the twenty-fifth day of November the following motion to dismiss is filed:

Motion to Dismiss.

And now comes the defendant in the above-entitled cause, and moves that said cause be dismissed and that a judgment of non-pros be entered, because in said cause no bill of particulars, such as is required by section 3012 of the Revised Statutes of the United States giving the particulars required by said section as to the goods described in the declaration and amended declaration, has been served upon the defendant or his attorney and that more than thirty days have passed since the notice to the plaintiffs or their attorney of the appearance of the defendant.

And thereupon the said motion and the motion to dismiss, filed November 23, are overruled by the court.

12 On the said twenty-fifth day of November the following agreement is filed:

Agreement.

It is agreed that under provisions of sec. 649, Revised Statutes of U. S., trial by jury be waived in the above case, and that the court pass upon both law and fact, the findings of law and fact to be made and kept distinct. Either party may except to rulings on matters of law within twenty days after the filing of the report, and judgment is not to be entered until the expiration of said twenty days, unless by mutual consent. After the report is filed either party may move the court for additional findings of facts or rulings of law; which motion the court may grant or not, in its discretion.

CHAS. LEVI WOODBURY,
Attorney for Plaintiff-.
GEORGE P. SANGER,
U. S. Att'y, Attorney for Defendant.

13 And on the same day the following statement of agreed facts is filed:

14 *Statement of Facts Agreed.*

The plaintiffs imported by the following vessels into the port of Boston, from France via Liverpool, certain merchandise described in the invoices as follows:

By the steamship "Istrian," Jan. 15, 1878, 4 cases Nicholson blue A., numbered 19,756, 19,757, 19,758, 19,759; 2 cases Nicholson blue B. V., numbered 19,760 and 19,761. Of these No. 19,756, Nicholson blue A., was entered for consumption Jan. 15, 1878, and the balance, to wit, 3 cases Nicholson blue A. and 2 cases Nicholson blue B. V., were entered for warehouse Jan. 15, 1878.

By the steamship "Samaria," Oct. 28, 1878, 1 case Nicholson blue G. A., numbered 13,395; 1 case Nicholson blue 4 B., numbered 13,396; 2 cases Nicholson blue B., numbered 13,387 and 13,388; 2 cases Nicholson blue B. B., numbered 13,389 and 13,390; 1 case blue R. R. S. 2, numbered 13,391; 2 cases vert B. 1, numbered 13,392 and 13,393; 1 case vert 2 J. E., numbered 13,394; 1 case rouge Francais, or French red, numbered 90,141. Of these 1 case, No. 13,387, containing Nicholson blue B.; 1 case, No. 13,390, containing Nicholson blue B. B.; 1 case, No. 13,394, containing vert 2 J. E., and the one case numbered 90,141, containing French red, were entered for consumption Oct. 28, 1878, and the balance, to wit, 1 case, No. 13,395, containing Nicholson blue G. A.; 1 case, No. 13,396, containing Nicholson blue 4 B.; 1 case, No. 13,388,
15 containing Nicholson blue B.; 1 case, No. 13,389, containing Nicholson blue B. B.; 1 case, 13,391, containing blue R. R. S. 2; 2 cases, Nos. 13,392 and 13,393, containing vert B. 1, were entered for warehouse Oct. 28, 1878.

By the steamship "Samaria," Dec. 4, 1878, 2 cases fuchsine B., numbered 39,407 and 39,408; 2 cases violet de Paris 170, numbered 39,409 and 39,410; 2 cases violet Hoffman 2 B., numbered 39,411 and 39,412; 1 case violet Hoffman R., numbered 39,413, all of which were entered for warehouse Dec. 4, 1878, except one case violet Hoffman 2 B., numbered 39,411, which was entered for consumption Dec. 4, 1878.

By the steamship "Bohemian," Dec. 23, 1878, 2 cases fuchsine J. O. O., numbered 39,443 and 39,444; 4 cases fuchsine B., numbered 39,445, 39,446, 39,447, and 39,448; 1 case blue D., numbered 39,449; 2 cases Nicholson blue B. B., numbered 39,450 and 39,451; 1 case *bleu ciel*, numbered 80,230, all of which were entered for warehouse Dec. 23, 1878, except the one case blue D., No. 39,449, and the one case *bleu ciel*, No. 80,230, which were entered for consumption Dec. 23, 1878.

All of the descriptions of merchandise, except the *bleu ciel* and French red, were described in the entry by the plaintiffs as aniline dyes, dutiable at fifty cents per pound and thirty-five per cent. ad valorem, and the defendant made an approximate estimate of the duties in accordance therewith. The French red was described in the entry by the plaintiffs as roccelline dye, dutiable as a non-enumerated manufacture at twenty per cent. ad valorem, and the *bleu ciel* was described in the entry by the plaintiffs as blue color,

dutiable as a non-enumerated color at twenty-five per cent. ad valorem, and the defendant made an approximate estimate of the duties in accordance therewith.

In due course the defendant sent the invoices to the United States appraiser for examination, appraisement, and report. At the same time the following-described goods and cases were ordered by the defendant to the appraiser's stores for examination, viz: Goods ex "Istrian," two cases Nicholson blue A., numbered 19,756 and 19,759. Goods ex "Samaria" of Oct. 28, one case vert B. 1, numbered 13,392; one case Nicholson blue B., numbered 13,387; one case French
16 red, numbered 90,141. Goods ex "Samaria" of Dec. 4, one case violet de Paris 170, numbered 39,410; one case violet Hoffman 2 B., numbered 39, 411. Goods ex "Bohemian," one case fuchsine B., numbered 39,447; one case blue D., numbered 89,449, and the one case *bleu ciel* numbered 80,230. In due course the appraiser reported upon each invoice the result of his examination and appraisement as follows: Invoice ex "Istrain," "Cudbear and aniline colors correct." Signed, J. T. C. and T. G. Rice. Dated Jan. 19, 1878. Invoice ex "Samaria" of Oct. 28, "Aniline colors correct." Signed, J. T. C. and J. E. Jones, assistant appraiser. Dated Nov. 1, 1878. Invoice ex "Samaria" of Dec. 4, "Aniline dyes correct." Signed, J. T. C. and T. G. Rice. Dated Dec. 5, 1878. Invoice ex "Bohemian," "Aniline dyes correct." Signed, J. T. C. and T. G. Rice. Dated Dec. 24, 1878. The invoices were returned by the United States appraiser to the defendant with the above-described reports thereon. It is agreed that T. G. Rice was the United States appraiser to whom the invoices were sent by the defendant. Upon these reports the defendant liquidated each entry, using the respective values reported by the appraiser as a basis, liquidating the duties on the descriptions classed as aniline colors at the rate of fifty cents per pound and in addition thirty-five per cent. ad valorem, and liquidatiug the duties on the *bleu ciel* at the rate of twenty-five per cent. ad valorem and those on the French red at the rate of twenty per cent. ad valorem.

The entries by the "Istrian" bear stamp of liquidation; that for warehouse, Feb. 4, 1878; that for comsumption, Feb. 8, 1878. Those by the "Samaria" of Oct. 28 bear stamp of liquidation; that for warehouse, Nov. 11, 1878; that for consumption, Dec. 11, 1878.

Those by the "Samaria" of Dec. 4 bear stamp of liquidation; that for warehouse, Dec. 23, 1878; that for consumption Jan, 13, 1879. Those by the "Bohemian" bear stamp of liquidation; that for warehouse, Jan. 15, 1879; that for consumption, Feb. 3, 1879. All of the merchandise entered for consumption was delivered to the plaintiffs upon the payment of the amount of estimated duties, which was the same in each case as the amount of the above liquidations, as follows: Ex "Istrian," No. 19,756, Nicholson blue A., delivered Jan.
19, 1878. Ex "Samaria" of Oct. 28, No. 13,387, Nicholson blue B., delivered Nov. 1, 1878; No. 13,390, Nicholson blue B. B.,
17 delivered Oct. 28, 1878; No. 13,394, vert 2 J. E., delivered Oct. 28, 1878; No. 90,141, French red, delivered Nov. 1, 1878 Ex "Samaria" of Dec. 4, No. 39,411, violet Hoffman 2 B., de-

livered Dec. 5, 1878. Ex "Bohemian," No. 39,449, blue D., delivered Dec. 24, 1878; No. 80,230, *bleu ciel*, delivered Dec. 24, 1878.

It is agreed that upon the payment of the duties liquidated at the dates before mentioned to be due by the defendant the following-described goods were delivered to the plaintiffs as follows, to wit:

Ex "Istrian," No. 19,759, Nicholson blue A., delivered Oct. 8, 1878; No. 19,760, Nicholson blue B. V., delivered Jan. 14, 1879; No. 19,761, Nicholson blue B. V., delivered Jan. 14, 1879.

Ex "Samaria" of Oct. 28, No. 13,395, Nicholson blue G. A., delivered March 20, 1879; No. 13,396, Nicholson blue 4 B., delivered Dec. 26, 1878; No. 13,388 Nicholson blue B., delivered Dec. 28, 1878; No. 13,389, Nicholson blue B. B., delivered Nov. 16, 1878.

Ex "Samaria" of Dec. 4, 1878, No. 39,410, violet de Paris 170, delivered March 25, 1879; No. 39,407, fuchsine B., delivered Jan 4, 1879; No. 39,408, fuchsine B., delivered Jan. 4, 1879; No. 39,409, violet de Paris 170, delivered Jan. 14, 1879; No. 39,413, violet Hoffman R., delivered Jan. 9, 1879.

Ex "Bohemian," No. 39,443, fuchsine J. O. O., delivered March 29, 1879; No. 39,445, fuchsine B., delivered Jan. 21, 1879; No. 39,446, fuchsine B., delivered Jan. 21, 1879; No. 39,447, fuchsine B., delivered Jan. 27, 1879; No. 39,448, fuchsine B., delivered Jan. 27, 1879; No. 39,450, Nicholson blue B. B., delivered March 25, 1879.

It is agreed that as to the other described goods they were delivered by the defendant to the plaintiffs upon what are known at the custom-house as special deposits under the instructions of the Secretary of the Treasury—synopsis 3663 of 1878—*i. e.*, at the time of delivery the plaintiffs deposited with the defendant a sum of money, in amount satisfactory to the defendant, to secure the payment of all duties to which the goods delivered should be found legally liable, to wit:

18 **Ex "Istrian," Nos. 19,757 and 19,758, containing Nicholson blue A., delivered June 6, 1879.**

Ex "Samaria" of Oct. 28, No. 13,391, containing blue R. R. S. 2, delivered June 6, 1879; No. 13,392, containing vert B. 1, delivered Aug. 27, 1879; No. 13,393, containing vert B. 1, delivered Oct. 27, 1879.

Ex "Samaria" of Dec. 4, No. 39,412, containing violet Hoffman B. B., delivered May 13, 1879.

Ex "Bohemian," No. 39,444, containing fuchsine J. O. O., delivered July 11, 1879; No. 39,451, containing Nicholson blue B. B., delivered Aug. 5, 1879.

It is agreed that by the order of the defendant there were sent from warehouse to the appraiser's store for examination packages as follows: Ex "Istrian," Nos. 19,757 and 19,758, containing Nicholson blue A., June 5, 1879. Ex "Samaria" of Oct. 28, No. 13,391, containing blue R. R. S. 2, and No. 13,392, containing vert B. 1, May 12, 1879. Ex "Samaria" of Dec. 4, No. 39,412, containing violet Hoffman 2 B., May 9, 1879. Ex "Bohemian," No. 39,444, containing fuchsine J. O. O., and No. 39,451, containing Nicholson blue B. B., May 12, 1879. It is agreed that at the request of the defendant, during the month of March, 1879, the United States appraiser re-

called the invoices from the defendant and made new reports thereon. The invoices may be referred to for these reports if material. These reports bear dates as follows: That by the "Istrian," April 9, 1879; that by the "Samaria" of Oct. 28, April 26, 1879; that by the "Samaria" of Dec. 4, April 30, 1879; that by the "Bohemian," April 30, 1879.

These second reports of the appraiser increased the value of the goods and advised the changing of classification of the *bleu ciel* and the French red and the imposition of duties thereon at the rate of fifty cents per pound and thirty-five per cent. ad valorem, which was the rate of duty provided by law for aniline dyes and colors by whatever name known. The plaintiffs, under the provision of sect. 2930 of the Revised Statutes of the United States, in the case of "Istrian," on the ninth day of April, 1879, and in the case of the other three importations, on the seventh day of May, 1879, gave notice to the defendant of their dissatisfaction with these last-
19 mentioned findings of the appraiser as to value, and requested a reappraisement under said section; and the defendant, in accordance therewith, selected, and on the tenth day of April, in the case of the "Istrian," and on the eighth day of May, in the case of the other three importations, appointed Samuel Cabot, Jr., a discreet and experienced merchant, familiar with the character and value of the goods in question, as the merchant appraiser to act with General Appraiser Briggs in a reappraisement of the goods. Under date of Dec. 10, 1879, this board of reappraisement made reports to the defendant in the case of each invoice, whereby they report their appraisement of the market value or wholesale price in the principal markets of the country whence imported at the period of exportation therefrom of the goods as follows:

In the case of invoice ex "Istrian," the four cases Nicholson blue A.

In the case of invoice ex "Samaria" of Oct. 28, the one case blue R. R. S. 2 and the two cases vert B. 1.

In the case of invoice ex "Samaria" of Dec. 4, the two cases Hoffman violet 2 B.

In the case of invoice ex "Bohemian," the two cases fuchsine J. O. O. and the two cases Nicholson blue 2 B., and in the case of each invoice the general and merchant appraiser reported to the defendant that they had not appraised the goods described in the respective invoices other than those last above named, because such other goods could not be found and had not been examined by them. These reports may be referred to.

In the case of entry for warehouse goods ex "Istrian," stamped as of April 20, 1880, the defendant made a second liquidation of the duties due on the merchandise embraced therein, and used the value found and reported by the general appraiser and merchant appraiser on the 10th of December, before referred to, of the goods appraised by them; and as to the goods not then reported by the general and merchant appraiser he used the value named in the invoice.

In the case of entry for warehouse goods ex "Samaria" of Dec. 4,

a second liquidation, stamped as of April 24, 1880, was made in the same manner by the defendant.

In the case of entry for warehouse goods ex "Bohemian," a
20 second liquidation, stamped as of April 24, 1880, was made in the same manner by the defendant.

In the case of entry for warehouse goods ex "Samaria" of Dec. 4, the defendant made a third liquidation, stamped as of June 1, 1880, based on the reports of appellate board of Dec. 10, 1879, and as to goods not then reported by appellate board he used the values reported by the local appraiser in his second report of April 30, 1879.

Under date of Dec. 15, 1879, the plaintiffs paid to the defendant, at the defendant's request, the bill rendered for the services of Mr. Cabot as merchant appraiser—*i. e*, one hundred and seventy dollars ($170), which was for thirty-four days' attendance, as certified by General Appraiser Briggs.

Under date of March 5, 1881, General Appraiser Briggs and the said Cabot, signing as merchant appraiser, made supplemental reports to the defendant as collector in the case of each of the invoices above specified, prefacing such reports as follows: "We have examined, in the manner authorized by instructions from the Secretary of the Treasury in Department letter addressed to you, dated Feb. 12, 1881, certain aniline dyes imported by Messrs. Cushing, Porter & Cades."

These reports and said letter of Feb. 12 may be referred to. In these supplemental reports the general appraiser and the said Cabot, signing as merchant appraiser, enumerate and state a value of those goods which were not appraised by them in their first reports, bearing date Dec. 10, 1879.

It is agreed that no request to the defendant was made by the plaintiffs subsequent to said Dec. 10, 1879, for any reappraisement of these goods.

Upon the receipt of these supplemental reports the defendant made a liquidation, which he claims to be final, of the duties on the merchandise described in each invoice, and used, as the values upon which such final liquidations were based, the values reported by the general appraiser and Mr. Cabot, the latter signing as merchant appraiser, and claiming to act as such, in the two reports of Dec. 10, 1879, and March 5, 1881, such liquidations being stamped as of dates as follows:

21 Entries by the "Istrian," March 26, 1881; entries by the "Samaria" of Oct. 28, March 29, 1881; entries by the "Samaria" of Dec. 4, April 2, 1881; and entries by the "Bohemian," March 26, 1881. It is agreed that the plaintiffs paid to the defendant as collector the sums of money which appeared by said last liquidations to be due, and seasonably protested to the defendant, and appealed to the honorable Secretary of the Treasury, who affirmed the action of the defendant; and the plaintiffs in due time brought this suit. The protests may be referred to.

It is agreed that E. A. Naville had, at the time of all the transactions above named, a power of attorney to attend to the commercial matters of A. Poirrier, the manufacturer and exporter of these goods; that the plaintiffs were the consignees of the said goods, and that said

goods were owned by A. Poirrier; and that the Boston Dye-wood and Chemical Company, a corporation of the Commonwealth of Massachusetts, was the selling agent in Boston of A. Poirrier for such goods. It is agreed that a letter signed A. Poirrier, dated Jan. 13, 1879, and a letter signed A. Poirrier, pr. pon. E. A. Naville, dated Jan. 8, 1879, addressed to and received by the plaintiffs, are genuine letters; and, if competent and material, they may be read by either party and put in evidence.

It is agreed that the above-stated facts shall, for the purposes of this trial, be deemed to be true; but either party may introduce any other competent and material evidence not repugnant thereto.

CHAS. LEVI WOODBURY,
For Plaintiffs.
GEORGE P. SANGER,
U. S. Attorney, Attorney for Defendant.

22 *Further Facts Agreed.*

It is agreed that none of the goods or samples thereof from these importations in this case, reported on March 5, 1881, by said Briggs and Cabot, were seen by them.

It is agreed that the said Cabot did not take any oath or receive any written appointment as merchant appraiser by the defendant subsequent to Dec. 10, 1879.

It is agreed that under date of March 4, 1881, Gen. Appraiser Briggs addressed a letter to J. P. Tucker, as attorney for the plaintiffs, which said letter was received on the same day by the said Tucker; a copy of which letter is herewith attached and made a part of this agreed statement.

CHAS. LEVI WOODBURY,
For Pl'ff-.
GEORGE P. SANGER,
U. S. Att'y, Att'y for Def't.

23 PORT OF BOSTON, MASS.,
U. S. GEN. APPRAISER'S OFFICE, *Mar.* 4, 1881.

MY DEAR SIR: In conferring with the collector, relating to a supplementary report of an appraisement in the aniline dye cases, he suggested that under the recent instructions from the department a rehearing is not contemplated, and upon consideration I concur with the collector in that view.

Having, without consideration, informed you that I would give you notice when the merchant appraiser and myself were ready to proceed with the reconsideration of the invoices, I now respectfully notify you that the notice heretofore contemplated will not be given.

Very respectfully, HENRY S. BRIGGS,
Gen'l App'r.

J. P. Tucker, Esq., att'y for Cushing, Porter & Cades, Porter, Cades & Austin, 28 State St.

24 This cause, thereupon, is fully heard by the court.

On the fifth day of March, 1883, the opinion of the court is filed.

On the twelfth day of April the following bill of exceptions is filed:

Plaintiffs' Bill of Exceptions.

This is an action of contract brought by the plaintiffs, merchants, against the defendant, collector of customs, for the recovery of certain monies paid under protest by the plaintiffs to the defendant as duties upon thirty-three packages of "dye-stuffs" imported by the plaintiffs as consignees from France into the port of Boston.

A copy of the protest is herewith attached and made a part of these exceptions.

Upon the hearing of the cause before the court, trial by jury having been waived by agreement of the parties under the statute,
25 all of the facts material to this bill of exceptions being contained in a statement of agreed facts, which statement is herewith attached and made a part of these exceptions, the United States attorney, counsel for the defendant, asked the court to rule that, as it appeared twenty-five of the packages had been delivered to the plaintiffs by the defendant before the payment of the duties thereon sued for, as a matter of law the plaintiffs had not shown themselves entitled to maintain this action against the defendant so far as this twenty-five packages were concerned, because the said payment under protest was voluntary and not made to obtain possession of the said twenty-five packages.

Whereupon, after hearing the parties, by their counsel, the
26 court was of the opinion and adjudged that, as a matter of law, when the plaintiffs paid the additional duties demanded by the collector upon the twenty-five packages the defendant had no means of compelling the payment, and that the plaintiffs could not now recover the money since the payment was voluntary.

To each of which rulings by the court the plaintiffs excepted.

No exception is taken as to the correctness of the ruling of the court as to the eight remaining packages.

Whereupon the court refused to consider further the agreed facts and the testimony which had been adduced before it as to the subject-matter of the protest in relation to the said twenty-five packages; to which refusal the plaintiffs except.

The plaintiffs pray that these their exceptions may be
27 allowed; and, being found to be conformable to the facts, the same are allowed.

JOHN LOWELL,
Circuit Judge.

28 BOSTON, *Apr.* 5, 1881.

SIR: We respectfully protest against your assessment and liquidation of duties as notified by you on the 26 of M'ch last upon an importation by us, as consignees, from A. Poirrier, of Paris, of

one case Nich. blue A., by the steamship Istrian from Liverpool, and entered for consumption on the 15th of Jan., 1878.

No. 1. We protest against your action because on the 8 day of Feb., 1878, you decided as to the rate and amount of duties due on this merchandise, and liquidated the same; and you have delivered to us the said merchandise, and we have paid all the duties you so decided upon and determined and settled to be due upon this merchandise, and more than one year has elapsed since the entry of said merchandise since your decision and liquidation and settlement of such duties and since the delivery to us; therefore, by virtue of the provisions of sect. 21 of the act of June 22, 1874, your said decision, liquidation, and settlement of duties upon this merchandise became final and conclusive against you, and the Government, as well as ourselves, not having been protested against by us, and no further duties can be legally assessed thereon.

Reserving our full rights under No. 1, we protest further—

No. 2. Because you having decided as to the rate and amount of duties due upon the merchandise described in this entry, and liquidated the same on the 8th day of Feb., 1878, your said decision became and is final and conclusive upon you and the Government, as well as upon us, not having been protested again by us, and more than ten days have elapsed since your said decision and liquidation.

29 No. 6. Because an examination of one or more kinds and qualities of goods in this invoice by an appraiser, or by the general and merchant appraiser, is not such an examination as is required and contemplated by law to warrant an appraisement of the value of other kinds and qualities of goods in the invoice, whereby the invoice value is overturned and a higher one substituted for the assessment of duties. Each kind and mark of the merchandise in this invoice and entry was and is of a different kind and value from all the other kinds and marks, and no valid appraisement of either kind and value can be made whereby our invoice value is overturned and a higher one is substituted, except upon an examination of the goods or samples.

30 No. 9. Because in determining whether or not the additional or penal duty of twenty per cent. accrues upon this merchandise you have included, in the computation of value, "commissions," while under the law it is the value of the merchandise only which determines whether the value of the merchandise by appraisement is more than ten per cent. above that declared in the invoice and entry.

And, unless the value found by a valid appraisement of the merchandise, without commissions, is ten per cent. or more above that declared in the invoice and entry, no additional or penal duty can be legally imposed.

No. 10. We object further to your said liquidation and assessment of duties on this merchandise of M'ch 26 last, because in it you include an additional or penal duty of twenty per cent. ad valorem, and inasmuch as such duty only accrues and is chargeable when by a valid and legal appraisement a value is found and determined equal

to ten per cent. or more above the value declared in the invoice and entry by us, and there never having been appraised and determined according to law, for the reasons before stated, a value equal to ten per cent. or more above that expressed and declared in the invoice and entry of this merchandise, no assessment and liquidation can be legally made of said additional or penal duty.

No. 11. Because under date of Jan. 19, 1878, the local appraiser estimated, appraised, and reported to you the value of the merchandise in this invoice and entry and that the invoice value was correct, and you liquidated and decided as to the rate and amount of duties due thereon, and more than ten days having elapsed without protest by us, prior to the 9th day of Apr., 1879, when the local appraiser attempted to make a second appraisement of the value of said merchandise, and neither the local appraiser or his legal representative ever saw or examined any of the goods or samples named in such invoice and entry after his report to you of Jan. 19, 1878; therefore his said report of Jan. 19, 1878, and your liquidation thereon, became final and conclusive upon you and the Government, and no further or higher duties can be legally assessed upon said merchandise by you.

No. 12. Because the report of the general and merchant appraisers, bearing date the 10 day of Dec., 1879, was in accordance with
31 the instructions and decision of the Secretary of the Treasury to the general appraiser, under date of July 3, 1879, in which the following appears: "The character of the goods in question cannot be ascertained except by an examination, and upon their character depends their value. It is, therefore, the opinion of the Department that, except as to the case cevered by samples before the reappraisement, they cannot take such action as would amount to a reappraisement upon which additional duties can be lawfully imposed."

More than one year having elapsed since such instructions and decision and report of the general and merchant appraisers thereunder, prior to the twelfth day of February, 1881, such instructions, decision, and report became and *was* final and conclusi*o*n upon you and the Government, and no further or greater duties can be legally imposed upon this merchandise than those arising from the said report of Dec. 10, 1879, and the invoice value.

For any one or all of these reasons we protest against your action in this matter and submit under compulsion, holding you and the Government responsible for any and all monies which we have or may pay in excess of that found lawfully due.

Yours very respectfully, —— ——.

To Hon. A. W. Beard, collector, etc., Boston.

32 It is thereupon considered by the court, to wit, April 12, 1883, that the said Thomas C. Porter, W. H. Cades, and S. Harris Austin, plaintiffs, take nothing by their said writ, and that the said Alanson W. Beard, defendant, recover of the said plaintiffs his costs of suit taxed at —.

A true record.
Attest: JOHN G. STETSON, *Clerk.*

33 The following is the opinion of the court upon which judgment was rendered April 12, A. D. 1883.

Opinion of the Court. March 5, 1883.

Circuit Court of the United States, District of Massachusetts.

THOMAS C. PORTER *et al.*
v.
ALANSON W. BEARD. } No. 1738. Law Docket.

LOWELL, *J.:*

In this action against the collector to recover back duties, said to have been erroneously assessed, the parties have waived a trial by jury and have agreed to most of the facts. The losing party is to have twenty days to file exceptions to my rulings of law.

The goods were thirty-three packages of dye-stuffs imported from France by way of Liverpool, entered and liquidated at a valuation, which the defendant afterwards raised by reliquidation. The second assessment is at the true rate of duty, but the regularity of the reappraisement and reliquidation is denied. The plaintiffs had received their goods, excepting eight cases, before the controversy arose, and when they paid the additional duty on all but these eight cases the collector had no means of compelling the payment, and they cannot now recover the money from him since the payment was voluntary. U. S. *v.* Schlesinger, 14 Fed. Rep., 682.

The eight packages were delivered after a reappraisement had been begun and upon what are known as special deposits under decision 3633 of the Secretary of the Treasury for 1878,
34 p. 578, of the printed synopsis for that year, by which a sum of money is left instead of the goods, and an examination is made by the merchant appraiser and general appraiser before delivery, and the importers bind themselves to abide the results of the appraisement "the same as if all the goods had been retained." Where goods are received in this way I hold that neither party can take advantage of the delivery as changing the rights of the other. On the one hand, the collector cannot say that the payment was voluntary, because he had the power to appropriate the plaintiffs' money instead of their goods; and on the other hand the plaintiffs are estopped to contend that the new liquidation was made after the goods were delivered.

These eight packages were imported at four different times, but one will serve to illustrate the question which has been argued. Two cases of "Nicholson blue A." were imported by the Istrian and entered January 15, 1878, at the invoice valuation, and the entry was liquidated accordingly February 8, 1878. In March, 1879, the appraisers recalled the invoice and made a new report, April 9, 1879, increasing the value on these two cases. The plaintiffs asked for the appointment of a merchant appraiser, as provided by Rev.

St's, § 2930, and one was duly appointed and sworn. These two cases were sent to the appraiser's store June 5, 1879, and were duly examined, and there were several hearings by the board, at which both parties examined witnesses and at which counsel were heard. December 10, 1879, the board reported sustaining the higher valuation of these Nicholson blue A. goods, and the defendant made a reliquidation of the entry April 20, 1880. In the meantime the goods were delivered, June 6, 1879, in the special manner already mentioned. The duties were assessed at this higher valuation and were paid under protest, and due appeal was taken to the Secretary of the Treasury, who confirmed the doings of the collector.

35 The only point of protest and appeal now insisted on is that the reliquidation was made more than a year after the entry, the goods having been delivered and duties paid in the meantime, contrary to Stat. 1874, ch. 391, § 21, 18 Stat., 190.

To this contention there appear to be two answers: 1. In point of fact, the duties were not paid on these eight packages of goods until after the reliquidation. 2. If I am mistaken and the goods had been delivered it was under a stipulation which treated them as still in the possession of the defendant and bound the plaintiffs to abide the results of the reappraisement. The only result which it was important that they should abide was the reliquidation which ensued, of course, when the value was increased by the board of appraisers.

My decision, therefore, is that the reliquidation of the eight packages was regular and binding and that the plaintiffs cannot recover.

When the bill of exceptions has been filed and allowed there will be judgment for the defendant.

36 *Assignment of Errors.*

Circuit Court of the United States, District of Massachusetts.

THOMAS C. PORTER *et al. v.* ALANSON W. BEARD.

The plaintiffs in the above-entitled case assigns the following errors for correction in the proceedings and rendition of judgment in the circuit court in the above-entitled cause, viz:

1. The circuit court erred in deciding as a matter of law that the payment of duties by the plaintiffs below, after due protest, appeal, and decision of the Secretary of the Treasury, on the twenty-five packages was a voluntary payment.

2. That it was a bar to the plaintiffs' right to recover in the suit.

37 3. In refusing, after its decision sustaining the motion of defendant, to consider the agreed statement of facts.

4. In entering judgment for the defendant.

5. In not entering judgment for the plaintiffs.

All of which are respectfully submitted.

THOMAS C. PORTER,
W. H. CADES, AND
S. HARRIS AUSTIN,
Plaintiffs,

By their attorney, CHAS. LEVI WOODBURY.

A true copy.
Attest: JOHN G. STETSON, *Clerk.*

38 UNITED STATES OF AMERICA, *Massachusetts District,* } *ss:*

I, John G. Stetson, clerk of the circuit court of the United States for the district of Massachusetts, within the first judicial circuit, certify that the foregoing is a true copy of the record of said circuit court in the cause of Thomas C. Porter *et al. v.* Alanson W. Beard, lately determined in said circuit court, and of all proceedings therein and of the opinion of the court.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this twenty-second day of September, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. STETSON, *Clerk.*

Endorsed on cover: Massachusetts C. C. U. S. No. 417. Thomas C. Porter, W. H. Cades, and S. Harris Austin, late copartners, doing business under the firm name of Cushing, Porter & Cades, plaintiffs in error, *vs.* Alanson W. Beard, collector of customs. Filed 18th October, 1884.

Supreme Court of the United States.

NO. 133. OCTOBER TERM, 1887.

PORTER, CADES, AND AUSTIN,

v.

A. W. BEARD, *Collector.*

BRIEF FOR PLAINTIFFS.

STATEMENT OF CASE.

This is an action brought by the plaintiffs to recover money illegally exacted by the defendant, Collector of Customs for the port of Boston and Charlestown, writ dated Aug. 13, 1881, amount claimed $694.05. The cause was referred to the Court on law and facts. An agreed statement of facts was filed, with liberty to either party to introduce at the hearing any other competent and material evidence not repugnant thereto. The hearing came off in October term, 1883; protest and appeal and payment by plaintiff were duly proved, but the Court was of the opinion that as matter of law the payment was a voluntary payment, and declined to consider the evidence offered by the plaintiffs to show the exaction to have been illegal. The plaintiffs presented their bill of exceptions, which was duly allowed and signed, and sued out a writ of error.

The issues involved here are raised by the bill of exceptions, p. 12, and assigned as errors, p. 16. It appears by the record, p. 8, that the plaintiffs duly paid the first liquida-

tion on said goods, and that from October, 1878, to January, 1879, all the packages now in suit were delivered to the consignee, except one package, which was delivered March 25, 1879; that various reliquidations took place thereafter, not necessary to be described; but on March 26, 1881, the reliquidations on entries by the "Istrian" on March 29, 1881; entries by the "Samaria" of October, 1878; on April 2, entries by the "Samaria" of Dec. 4, and entries by the "Bohemia" of Dec. 23, 1879, which the United States now relies on as the final liquidations, were made by the Collector; and the sum sued for as excess of duties was, after due protest and appeal to the Secretary of the Treasury, who affirmed the action of the defendant, paid to the Collector; and the plaintiffs seasonably brought this suit. See p. 10. The bill of exceptions shows, p. 12, on the hearing, the United States Attorney, counsel for the defendant; asked the Court to rule, that as it appeared twenty-five of the packages had been delivered by the defendant to the plaintiffs before the payment of the duties thereon sued for, as a matter of law the plaintiffs had not shown themselves entitled to maintain this action against the defendant so far as this twenty-five packages are concerned, because said payment under protest was voluntary, and not made to obtain possession of the said twenty-five packages. And the Court, after hearing the parties, adjudged, as matter of law, that when the plaintiffs paid, the Collector had no means of compelling the payment, and that the plaintiffs could not now recover the money, since the payment was voluntary, to which exception was taken; also to the Court's refusal to consider the agreed statement of facts.

Specification of Errors.

1. That the Court erred in deciding as a matter of law, that the payment of duties below, after due protest and

appeal and decision of the Secretary of the Treasury on the twenty-five packages, was a voluntary payment.

2. That it was a bar to the plaintiffs' right to recover in the suit.

3. In refusing after its decision sustaining the motion of defendant to consider the agreed statements of facts.

4. In entering judgment for the defendant.

5. In not entering judgment for the plaintiffs on the motion.

The r. al point in this case arises from the decision of the Court, Bill of Exceptions, fol. 26, as a matter of law, that when the plaintiffs paid the additional duties demanded by the Collector on the twenty-five packages, the defendant had no means of compelling the payment, and that the plaintiffs could not recover the money since the payment was voluntary.

This involved the erroneous construction of that part of § 3011, which gives the importer the right to sue the Collector to recover money illegally exacted and paid under protest, *and in order to obtain possession of merchandise imported by him*, and also ignores the statutory revenue system of the United States.

The Court treats the transient and imperfect custody of the importer, subject to the lien of the United States between the arrival and the final liquidation, as a bar to the powers of the Collector over the lien, and as a discharge of the lien of the United States for unpaid duties on the import. Also, it ignores that the objective point of § 3011 concerned a payment intended to discharge the lien of the United States, asserted by the liquidation on the import, and to obtain an exclusive possession of the goods by the importer contradistinguished from his concurrent rights. I propose to show that the Court erred both as to the powers of the Collector being destroyed, and as to the lien of the government to

compel the goods to respond to the liquidation being yielded or lost by a prior delivery.

Duties levied on an import remain *a lien*, no matter in whose hands the import may be found, until the true duties are paid. The importer can never have that possession which enables him to deal with the import as his own, free from the superior right of possession reserved by the revenue laws of the United States, without the payment of the duties imposed by law.

Plaintiffs' Claim.

The intent and true construction of the act of 1845, now Rev. Stat. § 3011, was to enable the importer, by paying the liquidated demand under protest, to obtain a possession which would be free from the lien of the government on the import for the liquidated demand; and is not to be narrowed by a custody under a ten-day bond, or any relation to the import or to estimated duties inferior to a title free from the lien *in rem* of the United States created by the particular liquidation.

Liabilities *in personam* for duties exist concurrent with the liabilities *in rem*, and the § 3011 appears particularly restricted to where a liability *in rem* exists.

The case United States *v.* Schleisinger, 120 U. S., concerned only the liability *in personam*. The matter now in issue was not before the Court.

That case ran on the single question whether the importer, who had protested and appealed, could defend an action *in personam* brought by the United States to recover short duties. The United States contended his only status in court, under existing laws, was to pay and sue to recover it back. This Court rightfully decided he could defend against a suit, under certain circumstances. There was no question, in this Schleisinger case, before this Court; in-

deed, it was admitted on both sides that the defendant had "obtained possession of the goods" before liquidation, and this Court had no occasion to construe or decide what intentions the statute expressed by the words "and in order to obtain possession of the merchandise," as a condition of the right to pay and sue to recover back.

In support of the construction the plaintiffs contend for, § 3011, we propose to show that, as matter of law, the lien for duties on the twenty-five packages did exist at the time of the payment under protest, and compelled us to pay to obtain a clear title and possession, and that we then did not have the clear possession which the statute contemplates.

That no statute has terminated this lien, except by the payment of the true duties, and no negligence of an officer can release the import from the lien.

That no delivery which any statute authorizes releases *the lien*, but the superior possession of the United States to enforce every liquidation remains.

That the authority of the Collector and his duty to enforce the *lien* continue as long as there are duties unpaid on the import.

That the Collector's power to reliquidate an entry where short duties or no duties have been paid does not cease until the limitation in the act of 1874, § 21, arises in fact.

That, as a matter of law, the Collector had legal powers to take the import and dispossess the importer, in order to compel the payment of this illegal exaction, which plaintiffs protested against and paid, in order to obtain possession of their import.

The authorities I shall refer to are briefed under separate heads.

The Lien of the United States.

Point I.

The *lien* of the United States on the import exists until the lawful duties on the imports are actually paid by the importer.

Rev. Stat. § 3058. All merchandise imported held the property of the consignee; any assignment, prior to the entry and payment of the duties, and the payment of all bonds then due and unsatisfied by the consignee to the contrary, notwithstanding.

Rev. Stat. § 2503. There shall be levied, collected and paid upon all articles mentioned in the schedule contained in the next section imported from foreign countries the rates of duty which are by said schedules respectively prescribed.

This form of levying the duty has been in use from the beginning of this government.

It has been often decided this levy constitutes a lien on the import.

In U. S. *v.* 350 Chests Tea, 12 Wheaton, p. 498,

the Court, under the act of 1799, say that the United States may sue at law to recover possession of goods on which they have a lien for duties.

Rev. Stat. § 2964, originally enacted in *1846*, directs the Collector to *take possession* of the import in case of neglect or failure to pay the duties. So also did the act of 1842, cited hereinafter.

1830. *Harris* v. *Dennie*, 3 *Peters*, 292, declares the United States have a lien on the import for the payment of

duties, and are entitled to the custody of them until the duties are paid.

Conrad v. *Pacific Ins. Co.*, 6 *Peters*, 281, defines the possession of the United States as concurrent or mixed for the benefit of the United States and the importer; it says the importer's right to the immediate possession becomes perfect the moment the lien for duties is discharged.

1839. In Meredith *v.* U. S. 13 Peters, 486.

That the duties due upon goods imported constitute a personal debt as well as a lien on the goods.

There are statutes which bear on this matter of the *lien*.

1799, § 49, authorizes the Collector and naval officers to make a gross estimate of the amount of duties, and on these being paid, or secured to be paid, to grant a permit for landing the merchandise.

After landing, the weighing, measuring, testing quality, marking, etc., were done. § 51.

The final liquidation of the entry came later, and on failure to pay it, the bond, § 62, was put in suit, and judgment had forthwith, unless the importer made oath, § 65, that an error had been made in the liquidation by the Collector, specifying the faults.

In 1842 cash duties and the warehouse system were substituted for the credit system.

§ 12 provides for the payment in cash and for the Collector, asserting the lien of the United States on the completion of the entry, in case of failure or neglect to pay the liquidated duties.

1842. § 12, 5 Stat. at L. p. 561, duties paid in cash, provided that in case of failure or neglect to pay the duties on the completion of the entry, the said goods, wares or merchandise shall be taken possession of by the Collector and

deposited in the public stores, there to be kept with due and reasonable care at the charge of the owners, etc.

Rev. Stat. § 2964. In all cases of neglect or failure to pay the duties within the period allowed by law to the importer, to make entry thereof (or when importer shall desire it), the merchandise shall be taken possession of by the Collector and deposited in public stores, etc.

The Act 1846, § 1, amended, § 12, 1842, so it read substantially as in Rev. Stat. §2964; the duty of the Collector to watch over the lien *in rem* in the import is equally imperative with his care over the security *in personam* for the duties.

The Collector cannot release the goods from the lien.

In Minturn *v.* U. S., 106 U. S. 438, the effect on the bond of the officers surrendering the goods without payment of the duties, in fraud or error, was in question.

The Court said there was no power in any officer of the government to alter the terms and effects of this contract and destroy the obligation of the bond by giving up the goods without payment of the duties.

The statute required the holding of the goods, and the taking of the bond. . . .

The giving up of the goods without the payment of the duties was an act not only unauthorized, but forbidden by statute.

The Court cite with approbation Hart *v.* U. S., 95 U. S. 318, to the like effect, as to a distiller's bond.

In Boyd *v.* the U. S., 116 U. S. p. 624, the Court say of the officer, "and until such duties are paid has a right to keep them under observation or to pursue and drag them from concealment."

No statute prior to § 21, 1874, has authorized the Collector to relinquish or has declared a relinquishment by the United States of its *lien* on the *rem* for the duties levied on the

import; statutes making it penal to interfere with seizures, or to remove merchandise liable to be seized, are in force. § 5446, § 5447.

Only the statute of limitations terminates the lien of those penal clauses that forfeit the merchandise for certain irregularities of the importer. See Rev. Stat. § 2882, § 2987, § 2924, § 2839, § 2864, § 5445; see also U. S. *v.* Wood, 16 Peters.

The authority to search for and seize the *rem* by virtue of any law respecting the revenue in or out of their district is given by Rev. Stat. § 3071, § 3072, § 3061, § 3065 and § 3066.

The possessory right of United States until duties are fully paid, and the means to compel and enforce it as long as the goods are not destroyed, are thus amply provided for and recognized by law.

In Stockwell *v.* U. S., 111 U. S. p. 546, the Court incidentally say: "The goods themselves, if the duties be not paid, are subject to seizure and appropriation by the government. In a very important sense they become the property of the government"; and proceed to say that acts which interfere with or hinder the exercise of this right of seizure by the government are wrongs to property rights.

In Iasigi *v.* Collector, 1 Wall. 383, "As a mere matter of law, the Collector has the power to recall the goods," etc.

These statutes and authorities show: —

1. That the lien of the United States on the import continues until the payment of the true duties, and its superior right of concurrent possession of the import is never lost whilst merely short duties or no duties have been paid. Meredith *v.* U. S., 13 Peters, 493.

2. It is the duty of the Collector to keep the goods under observation and take exclusive possession of them, at the importer's risk and charge; or to retain them in warehouse

until the true duties are paid, and means are provided him by law to exercise this authority.

3. That his laches or errors do not discharge the lien of the United States on the import.

The Liquidation by the Collector.

In the act of 1799 no time was fixed for the liquidation by the Collector, nor has any subsequent act, prior to 1874, fixed any period. The estimate is made on the *ex parte* statements of the importer; the liquidation is made after the careful examination of the merchandise, its appraisement, together with the ascertaining the charges, value at exportation, and the proper tariff classification and its actual quantity.

The import remains in the hands of the United States, or the merchant gives a bond in double its value to produce it unopened and at the call of the United States, for a period of ten days after the appraisement has been reported to the Collector. See act 1830, § 4, R. S. 2899. The statute, at the same time, directs the Collector (§ 2964, also act 1842, § 12) to take possession of the merchandise and deposit it in the public stores if there is failure or neglect to pay the duties within the time allowed by law. No time was specified for the liquidation prior to the act of 1874, nor in that act.

Contention grew up whether the Collector could revise a liquidation once made by him. The Treasury Department held that he could, and practically he did so whenever circumstances called for it. There was no statute which made a liquidation conclusive on the United States, or which forbid a reliquidation to correct errors or mistakes.

The admission of the courts that an action of debt lay for the United States wherever no duties or short duties had been paid is equally an admission that the *lien* on the imports

lasts as long as the right to sue *in personam* for duties, because: —

The duties are levied *in rem*, and the liability of the owner *in personam* grows from his relation to *the rem*, the import.

They are coexistent and double or concurrent means for the collection of duties, and the resort to one is not a discharge of the remedy which can be obtained from a resort to the other.

Act of 1857 first gave any legal effect to a liquidation by the Collector on the question whether goods were free or dutiable; the act of 1864, § 14, enlarged and changed this, and is now in force as § 2931.

This Court has held both in Westray and Schleisinger cases that his decision is conclusive, if not appealed from, against the importer.

On the question whether the decision of the Collector was declared by the statute, § 2931, conclusive against the government, or only conclusive against the importers; the clause says against "all persons interested therein," viz., the import or the vessel, the United States not being named, it was considered by the treasury officials that it was not estopped from making as many reliquidations as the circumstances and truth called for, in the effort to obtain the just and correct duty, and it acted in pursuance.

The hardship was grievous. Decisions of circuit courts were, U. S. *v.* Phelps, 17 Blatchford, 316: Such liquidation is not made final and conclusive against the United States. There is nothing in the section (§ 2931) which forbids a reliquidation or a new decision by the Collector, even after the payment of all the duties fixed by a prior liquidation, or even after the refunding of money deposited beyond the amount of duties so fixed. To the same effect was *U. S. v. Watt*, 15 *Blatchford*, 30. Congress had evidently been of

the same impression with regard to § 2931, and the laws then in force, for it enacted the act of June 22, 1874, § 21, to the effect that, whenever duties on imported merchandise had been liquidated and paid, and such merchandise delivered to the consignee, such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud, and in the absence of protest by the owner or consignee, be final and conclusive against all parties.

This action shows a concurrence of opinion in the legislative and judicial departments with the executive, that prior to this no matter of time would bar the United States from the exercise of all its granted powers in the collection of duties levied on merchandise.

A final settlement of duties between the consignee and the government is thus stipulated for *by law* when the lien for the duties *in rem*, and the consequent liability of the importer in debt can be extinguished together.

Delivery does not release the lien of the United States, nor abandon its superior possession of the import.

The act of 1874, § 21, declares the power of liquidation continues after a delivery, and, as already shown, liquidation defines the extent of the lien, and ascertains whether the duties have been paid.

Delivery.

Estimated Duties Distinguished from Liquidated Duties.

This distinction is found in the act of 1799. On applying for a permit to land his imports, the merchant was called upon to pay or secure the payment of the duties *estimated* by the Collector and naval officer on the invoice of the entry, § 49.

The bond was to pay the true duties as they afterwards should be ascertained, § 62, or a certain amount. When this

bond was put in suit, judgment was rendered at the first term unless the defendant made oath that errors had been committed in the *liquidation* of the duties demanded on such bond, specifying the errors, etc., § 65.

This mention of *liquidation* of *duties* in the statutes shows it to have been distinct and subsequent act to the *estimate* at the application for a permit.

Twice this Supreme Court has decided this substantially, under the protest act of 1845.

In Mariot *v.* Brune, 9 Howard, 636, that the time for the protest was not at the payment of the estimated duty when applying for the permit to land, but at the subsequent liquidation.

In Tremlet *v.* Collector, 13 Howard, p. 307, the Court again say that the estimated duties are received as a trust for the United States for the amount that should be found actually due and for the importer for the balance.

The Import.

As already shown, the delivery to the merchant under the act of 1799 had taken place on payment or securing of the estimated duties, and before the liquidation. So it has been in consumption entries ever since.

The § 65 required the merchant who contested his liability on his bond to give notice of the errors of liquidation to the Collector as a condition to defend. The act of 1845, which grew out of the decision in Cary *v.* Curtis, required a similar notice by way of written protest. Evidently this notice could not refer to the delivery on estimated duties, as it was a protest against the subsequent LIQUIDATION by the Collector. In § 2931 the language is clear that the protest and appeal is not against the estimated, but on the demand for the *liquidated* duties.

It is clear from these decisions and statutes that the delivery before liquidation did not oust the United States of its possession, nor bar the importer from his action under the act of 1845. Otherwise no protest on a consumption entry could have been legal. The analogy is the same in all cases where, from any cause, accident or wrong, "short duties" or "no duties" have been paid.

Delivery.

It may be asserted, on the other side, that the Collector is authorized by law to relinquish the lien of the United States in entries for consumption, by the act of 1830, now embodied in § 2899, which provides he may, after permit for the landing of the goods, take a bond in double their value to return the merchandise within ten days after the report of the appraisers, or sooner, if demanded. This applies only to merchandise entered for consumption in place of warehousing. It merely makes the importer a temporary custodian of the United States, without the right to open a package, subject to the major right of the United States. Neither the statute nor the form of the bond in it refer to the payment of duties, nor suggest any relinquishment of the lien of the United States therefor. It is merely a custody proviso between the estimated duties paid with the permit to land, and the subsequent period when liquidation takes place. The § 12, 1842, directs the Collector to warehouse the imports if there is any neglect or failure to pay the *liquidated duties;* so, also, § 2964, Rev. Stat. The neglect of the Collector to order the import to warehouse within ten days after the report of the appraiser would not, either by any general or special law, discharge the lien of the United States for unpaid duties.

Nor would it relieve the importer from tort and penalties

if he undertook to control the imports adversely to the United States after liquidation and before payment.

Probably Congress, in 1830, thought the Co'lector could liquidate entries within ten days after the reports and appraisement, but it did not discharge the lien of the United States on the merchandise if he failed to liquidate the entry within that time. For many years past, practically, it has been found impossible to complete liquidations in ten days. Goods entered for warehouse do not give this bond, but all entered for consumption, besides paying the estimated duties, give this bond.

If that bond delivery to the merchant before liquidation vests him with that possession which the act of 1845 refers to by the word "obtain" then the right of protest and suit does not exist as to any goods entered for consumption. The United States will be compelled to sue on every liquidation that exceeds the estimated deposit. This was not the intent of the statute. Almost every dispute between the merchant and the Collector arise upon liquidation and not before. The seriousness of such a construction to the Treasury is obvious.

Moke *v.* Barney, 5 Blatchf. 276, in 1865. Judge Nelson says the courts had some embarrassment, "but it was finally agreed, and such has been the practice since, that if the protest was made at the time of the final liquidation and refunding of the balance, it was in time."

This is conclusive, that the bond was not regarded as dispossessing the United States of *its lien*, or as giving the merchant such a possession of the import as would debar him from paying to obtain them free from the demand, and yet leave them liable to be taken by the United States and held on its lien. The term in the act of 1845, "in order to obtain" the goods, and that in § 3011, in order to "obtain possession of" the merchandise, mean the same thing, to relieve the *rem* from the demand of duties imposed.

The sum of the revenue laws is that the Collector is invested with two powers: —

1. As an assessor, to ascertain the debt due for duties on the import, until such "a settlement of duties" as the act of 1874, § 21, defines is had.

2. That of coercion by seizure and reseizure of the import, and holding it until his demand is paid. This power to seize and hold the import is absolute; the remedy for his illegality comes afterwards. Resistance or obstruction is a misdemeanor, R. S. § 5446. He may direct suit on the bonds or for debt, but he holds the import till final judgment.

The merchant has no way to prevent an illegal seizure by the Collector. It is on this account that the plaintiffs were coerced to pay his demand to obtain possession of their merchandise, free from his power, and be able to perform their obligations to their customers, free from seizure.

This brief is also intended to support the second, third, fourth and fifth assigned errors.

The errors of the Circuit Court have excluded the plaintiffs from a hearing on the merits of their cause. A similar position of the United States is characterized in U. S. *v.* Ellsworth, 101 U. S. p. 174: "Call it mistake of law or mistake of fact, the principles of equity forbid the United States to withhold the same from the rightful owner."

Respectfully presented,

CHAS. LEVI WOODBURY,
for Plaintiffs in Error.

124-429

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In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THOMAS C. PORTER, W. H. CADES, and S. Harris Austin, late copartners, doing business under the firm name of Cushing, Porter and Cades, vs. ALANSON W. BEARD, COLLECTOR OF CUSTOMS. } No. 132.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF OF ARGUMENT FOR DEFENDANT IN ERROR.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF OF ARGUMENT FOR DEFENDANT IN ERROR.

The plaintiffs, on the 13th day of August, 1881, brought suit to recover from the defendant, who was collector of the port of Boston, duties paid on certain dye-stuffs, claimed to be in excess of the amount imposed thereon by law. There were four different importations. The bill of exceptions only relates to twenty-five packages. The duty was liquidated on the several entries according to the invoices. It was paid according to the liquidation thus made. The goods were delivered to the plaintiffs.

A few days after the delivery of the goods to the plaintiffs the defendant recalled the invoices, and the dyes were reported by the appraiser at an increased value. The plaintiffs asked a reappraisement, under section 2930. The reappraisement was had, report made, and after final liquidation the duties were assessed thereon. The plaintiffs protested and appealed. The final liquidation was affirmed by the Secretary of the Treasury. The plaintiffs paid the amount additional which the final liquidation exceeded the first liquidation by the invoices, and, in this action, sues to reeover the amount last paid.

The circuit court ruled:

> Because the said payment under protest was voluntary, and not made to obtain possession of the said twenty-five packages, the plaintiffs could not maintain their action.

This ruling raises the only substantial question in this case. The case of *Arnson* vs. *Murphy, collector* (109 U. S., 253), rules:

> From this review of the legislation and judicial history of the subject it is apparent, that the common-law action recognized as appropriate by the decision in *Elliott* vs. *Swartwout* (10 Peters, 137) has been converted into an action based entirely on a different principle, that of a statutory liability, instead of an implied promise, which, if not originated by the act of Congress, yet is regulated as to its incidents by express statutory provisions. And among them are, the conditions which fix the time when the suit may begin and prescribe the period at the end of which the right to sue shall cease. Congress having undertaken to regulate the whole subject, its legislation is necessarily exclusive.

The case of *The United States* vs. *Schlesinger* (120 U. S., 113) rules:

> The view of the circuit court was that, under section 3011, there could be no suit against a collector to recover back an excess of duties paid on merchandise imported, unless the payment, in addition to being made under protest, was made "in order to obtain possession" of the merchandise; that section 2931 did not destroy the limitation imposed by section 3011 on the right to sue to recover back duties, or create any right to sue independently of such limitation; and that, consequently, as it was plain, as a fact, that the $2,009.30 of duties liquidated and sought to be recovered were illegally imposed, the importers could not, after paying them, recover them back, but could obtain the benefit of the exemption from the duty demanded by a defense in this suit, and by that means alone.
>
> We concur in this view, and are of opinion that the proper construction of section 2931, in view of the fact that section 3011 is in force concurrently with it, is that the decision of the Secretary of the Treasury is not final and conclusive, except in a case where, after a protest and an appeal, a payment of duties is made in order to obtain *possession of the goods*, and then a suit is not brought to recover back the duties within the times and under the limitations prescribed by section 2931.

Section 3011 provides:

> Any person who shall have made payment under protest, *and in order to obtain possession* of merchandise imported for him, to any collector, or person acting as collector, of any money as duties, when such amount of duties was not, or was not wholly, authorized by law, may maintain an action in the

nature of an action at law, which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid; but no recovery shall be allowed in such action unless a protest in writing, and signed by the claimant or his agent, was made and delivered at or before the payment, setting forth distinctly and specifically the grounds of objection and the amounts claimed, and appeal shall have been taken as prescribed in section 2931.

As, therefore, the plaintiffs did not "make payment *in order to obtain possession* of merchandise imported" by them, there could be no recovery, and there is no error in this record.

G. A. JENKS,
Solicitor-General.